

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE

AMERICAN CONCRETE PRODUCTS, INC.  
Employer

and

Case 32-RC-5343

LABORERS UNION LOCAL 270,  
LABORERS INTERNATIONAL UNION  
OF NORTH AMERICA, AFL-CIO, CLC  
Petitioner

*Richard N. Hill, Esq., (Littler Mendelson)*  
San Francisco, California, for the Employer.

*Alan G. Crowley, Esq., Alameda, California,*  
for the Petitioner.

**ADMINISTRATIVE LAW JUDGE'S REPORT ON OBJECTIONS**

Jay R. Pollack, Administrative Law Judge: Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the Regional Director for Region 32 entered a report and recommendations on objections, and ordered a hearing before an Administrative Law Judge. I heard the matter in Oakland, California, on July 12, 2005.

The representation petition in this matter was filed by Laborers Local 270 (the Union) on April 28, 2005.<sup>1</sup> Pursuant to a Stipulated Election Agreement approved by the Regional Director for Region 32 on Friday, May 11, an election by secret ballot was conducted on June 3 in the following unit:

All full-time and regular part-time production and maintenance employees, including all welders, mechanics, equipment operators, fork lift operators, carpenters, finishers, laborers, yardmen, drivers and foremen employed by the Employer at its Morgan Hill, California facility; excluding all managers, salespersons, office employees, employees, employees working under a collective bargaining agreement with another labor organization, all other employees, guards and supervisors as defined in the Act.

The Tally of Ballots served on all the parties at the conclusion of the balloting showed the following results:

---

<sup>1</sup> All dates hereinafter refer to calendar year 2005.

	Approximate number of eligible voters.....	31
	Number of void ballots.....	0
	Number of votes cast for Petitioner.....	18
5	Number of votes case against participating labor organization.....	13
	Number of valid votes counted.....	31
	Number of challenged ballots.....	0
	Number of valid votes counted plus challenged ballots.....	31

- 10 Thereafter, American Concrete Products (the Employer) filed timely objections to the election, a copy of which was served on the Union by the Region. The Regional Director set for hearing the following objection filed by the Employer:

Objection No. 1

15

1. The Union and its agents, representatives and/or supporters interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by verbally and physically threatening, coercing and intimidating employees in the exercise of their Section 7 rights.

20

The Employer contends that former employee, Fred Carrillo, an alleged union supporter, shot a nail gun at employee Cirilo Bustos, a known adherent of the Employer's position against union representation. Further, the Employer contends that Carrillo brought a hand gun to work and told another employee that the gun was reserved for Bustos. Finally, the Employer  
25 contends that Carrillo brought a firearm to work on the weekend before the election and that such conduct created an atmosphere of fear and intimidation.

Bustos was originally a supporter of the Union but changed his mind after being told by the Employer's general manager that if the Union was voted in, Bustos would not be permitted  
30 to work as a contract employee after he retired in July. Bustos was expecting to retire at the end of June and work on a contract basis until November when he planned to move to Mexico. However, prior to the hearing, he was asked by the Employer to remain through the end of the year to help the Employer find a replacement.

Bustos testified that he and Carrillo joked with each other since Carrillo was first hired by the Employer in 2002. According to Bustos, Carrillo pointed to his waist and stated that he had a gun. Bustos admitted that he never saw Carrillo with a gun at work. Bustos claimed that employee Alphonso Lopez told him that Carrillo had a gun at work. Lopez never testified.  
35 There was no evidence to connect the gun allegations to the Union. Although the credible  
40 evidence shows that Bustos harassed Carrillo from the beginning of Carrillo's employment by engaging in inappropriate and unwelcome touching of Carrillo, Bustos incredibly denied

engaging in such conduct I certainly do not credit Bustos' denials that he touched or provoked Carrillo. I, therefore, found Bustos to be a witness unworthy of belief and do not credit any of his testimony.<sup>2</sup>

5 Carrillo testified that from the time that he began work with the Employer, Bustos engaged in unwanted touching. Carrillo complained to the Employer's supervisor, who simply explained that Bustos often engaged in such horseplay. Bustos paid no attention to Carrillo's request that he cease his inappropriate touching. Carrillo, while denying that he ever brought a gun to work, admitted that he often pretended to have a gun in order to keep Bustos and his  
10 unwelcome touching away. Bustos apparently did not take Carrillo's comments seriously and returned the next day, or even the same day, to engage in the same unwanted conduct.

Employee Jaime Alvarez testified that he worked in the carpenter's shop with Carrillo.<sup>3</sup> Alvarez observed Bustos engage in unwanted horseplay with Carrillo from the beginning of  
15 Alvarez's employment with the Employer in 2003. Alvarez testified that Bustos engaged in the conduct so often that Alvarez no longer paid attention to it. Alvarez told Bustos that Bustos should leave him alone. Both Alvarez and Bustos testified that Alvarez was the only employee that Bustos did not joke with.

20 Bustos further testified that Carrillo pointed a nail gun at him and shot the nail gun at the wall behind Bustos. Again, there is no evidence that this conduct was connected to the representation case. According to Carrillo and Alvarez, Carrillo would yell at Bustos to go away and point a nail gun at Bustos. After Bustos was in a safe position, Carrillo would often shoot the nail gun at the wall. Bustos' conduct and Carrillo's reaction to it had gone on for years. This  
25 conduct was so common that Alvarez paid no particular attention to it.

Carrillo did not attend union meetings nor organize on behalf of the Union. However, at certain meetings held by the Employer during the election campaign, Carrillo did ask the Employer's labor consultant to explain his position. Apparently, based on these questions, the  
30 Employer contends that Carrillo was a leading Union supporter. There is no evidence that Carrillo was an agent of the Union.

Employee Javier Perez testified that he was present when the police investigated an alleged incident involving gunfire at the Employer's facility.<sup>4</sup> However, Perez could not testify

---

<sup>2</sup> The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary, or testimonial evidence, or because it was in and of itself incredible and unworthy of belief.

<sup>3</sup> Carrillo and Alvarez were the only two employees who worked in the carpenters' shop. Bustos and another employee worked in the mechanics' shop. Bustos had to walk through the carpenters' shop to get to his work area.

<sup>4</sup> The election was held on Friday, June 3. On the following Monday or Wednesday, the police investigated an allegation of gunfire on June 4. Carrillo was suspended on June 8 and discharged on June 15, allegedly for firing a weapon on Saturday June 4. Carrillo denied engaging in such conduct. To the extent the Employer contends that Carrillo fired a weapon on its facility on the Saturday before the election, I find that Carrillo did not even work that day, and, thus was not even present at the Employer's facility on the Saturday before the election.

whether this occurred before or after the election. Perez testified that he believed that Carrillo had brought guns on to the facility because the police “showed up at the facility.” However, the police arrived at the facility after the election at issue herein. Perez testified that Bustos told him that Carrillo had threatened Bustos with a nail gun. However, Perez could not testify as to when he received this information from Bustos. As I do not credit Bustos’ testimony under oath in court, I certainly do not credit what he told another employee out of court.

Employee Manuel Cadena testified that Bustos told him that Carrillo brought guns to work. Again, I find no truth to Bustos’ statements to other employees such as Cadena. Further, there is no evidence connecting Bustos’ false statements to the election. Cadena had knowledge that Carrillo shot a nail gun at Bustos but did not contradict the testimony that this was a longstanding reaction by Carrillo to Bustos’ unwanted horseplay.

Employee Raul Sandoval testified that he had heard about some gunfire on the Employer’s premises weeks before the election. Sandoval could not state when this alleged gunfire took place. He also testified that he had heard of gunfire on the Employer’s premises the Saturday before the election. I find that Sandoval was mistaken and meant the Saturday after the election because noone worked the Saturday before the election. The police investigated alleged gunfire at the Employer’s facility during the week following the election. Apparently, Sandoval overheard a conversation between Bustos and employee Jose Cruz. Bustos apparently accused Carrillo of misconduct. I give no weight to Bustos’ out-of-court statement. Cruz did not testify in this proceeding. Sandoval testified that Cruz told him that Carrillo was firing at squirrels on the Saturday before Memorial Day. Neither Cruz nor Carrillo worked that day. If Sandoval meant the following Saturday, he was talking about a day after the election at issue herein. Sandoval testified that he regretted voting for the Union, apparently because the Union had not yet obtained benefits for him. I give no credit to Sandoval’s testimony that he voted for the Union because he was afraid of “problems” if the Union lost the election.

Mario Vargas, a labor consultant for the Employer, testified that Javier Perez was afraid of Carrillo. Perez did testify to being afraid but also testified that he was not afraid of telling the truth. Perez testified that he did tell the truth at the hearing. Vargas testified that Perez gave him hearsay evidence from other employees that Carrillo had brought guns to work. Such double hearsay is clearly unreliable. Vargas attempted to testify that all the employees were afraid of Carrillo but when asked for specifics, he could only name Perez. As the Employer’s labor consultant, Vargas would benefit by a second election and was obviously not an impartial witness.<sup>5</sup>

Gary Konnie, the Employer’s vice president of human resources, credibly testified that he was unaware of Bustos’ harassment of Carrillo and Carrillo’s reaction to such harassment. However, Konnie works in Houston, Texas. The evidence is undeniably clear that the Employer’s local management must have had knowledge of Bustos’ conduct and failed and

---

<sup>5</sup> The Employer’s employee witnesses spoke Spanish while Carrillo only spoke English. Except for Bustos, who was not a credible witness, these employee witnesses had little or no contact with Carrillo. While the Employer contends that these witness were afraid of Carrillo and, therefore, reluctant to testify against Carrillo, it appears the witnesses were reluctant to testify, under oath, to alleged misconduct by Carrillo to which they had no personal knowledge. Finally, it appears that the employee witnesses’ perception of Carrillo was tainted by the Employer’s post-election discharge of Carrillo.

refused for years to put an end to such conduct. Neither Eric Sholtz, the general manager of the Employer's facility, nor any of the local supervisors testified. Bustos is still working for the Employer and apparently has not faced any disciplinary action. Prior to the election, the Employer tolerated Bustos' improper conduct and Carrillo's reaction to that conduct. After the election, the Employer sought to capitalize on Carrillo's conduct to set aside the representation election. It seems clear that the Employer had a duty to end Bustos' conduct towards Carrillo and Carrillo's response thereto. The Employer should not now be permitted to profit by its own wrongdoing.

## Conclusions and Recommendations

The Board applies an objective standard, under which conduct is found to be objectionable if it has "the tendency to interfere with the employees' freedom of choice." *Cedars Sinai Medical Center*, 342 NLRB No. 58 (2004); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995). In deciding whether such interference has occurred under this standard, the Board considers: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; (9) the degree to which the misconduct can be attributed to the party. See, e.g., *Taylor Wharton Division*, 336 NLRB 157, 158 (2001); *Chicago Metallic Corp.*, 273 NLRB 1677, 1704 (1985), *enfd.* 794 F.2d 527 (9th Cir. 1986).

While Carrillo was arguably a union supporter, there is no evidence that he was acting as an agent of the Union. As a consequence, Carrillo's alleged wrongdoing may only be considered under the standard for granting a new election based on misconduct by third parties. That test requires a finding that the misconduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible." *Cal-West Periodicals, Inc.*, 330 NLRB 599, 600 (2000).

In the instant case, the evidence shows that Bustos engaged in unwanted touching or horseplay for three years and that Carrillo responded by pretending to have a gun, pointing a nail gun at Bustos and shooting a nail gun at a wall. This conduct started years before the representation election and continued during the election campaign. There is no evidence that the conduct changed during the election campaign. I find that the Employer is attempting to set aside the election based on conduct which it tolerated and condoned for years.

A party to an election case is ordinarily estopped from relying on its own misconduct as objectionable. *B. J. Titan Service Co.*, 296 NLRB 668 (1989); *Republic Electronics*, 266 NLRB 852 (1983). In *Emerson Electric*, 247 NLRB 1365, 1370 (1980), *enfd.* 649 F.2d 589 (8th Cir. 1981), the Board affirmed an administrative law judge's finding that anti-union employees had spread a false rumor that a pro-union employee had brandished a gun. The Board refused to set aside the election based on "a false rumor which was circulated by an adherent of the losing side." The Board, citing *Willis-Shaw Frozen Express*, 209 NLRB 267, 269 (1974), stated that "wrongdoers cannot be the beneficiaries to their wrongdoing irrespective of who the wrongdoers [are]." Applying these principles to the instant case, I find that the Employer cannot benefit by setting aside the election based on its failure to end Bustos' harassment of Carrillo and Carrillo's reaction to that harassment.

I recommend, that the Employer's objections to conduct affecting the results of the election be overruled and that the Union be certified as the duly elected representative of all employees in the stipulated appropriate bargaining unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:

**ORDER<sup>6</sup>**

The Employer's objections to conduct affecting the results of the election in the above matter are overruled. The Regional Director for Region 32 shall certify the Petitioner as the collective-bargaining representative of employees in the appropriate unit.

Dated, San Francisco, California, July 27, 2005.

---

Jay R. Pollack  
Administrative Law Judge

---

<sup>6</sup> Any party may, under the provisions of Section 102.67 and 102.69 of the Board's Rules and Regulations, file exceptions to this report with the Board in Washington, D.C., within fourteen (14) days from the issuance of this report. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. Exceptions must be received by the Board in Washington, D.C. by **August 10, 2005**.